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Md Masud Rana v Public Prosecutor

B COURT OR APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05(M)-511–10 OF 2019
VAZEER ALAM MYDIN, HASHIM HAMZAH AND AZMI ARIFFIN JJCA
23 JANUARY 2024

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Criminal Law — Appeal — Appeal against sentence — Appellant was found guilty under s 302 of Penal Code — High Court judge sentenced appellant to death — Appellant appealed against sentence — Whether amendment to s 302 of Penal Code pursuant to s 34 of the Abolition of Mandatory Death Penalty Act 2023 applicable in the present appeal — Whether the death penalty ought to be changed to a term of imprisonment — Abolition of Mandatory Death Penalty Act 2023 s 34 — Penal Code s 302

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E This was a heartbreaking case of relationship turned sour which ended with the murder of the deceased by the appellant. Both the deceased and the appellant suffered injuries in this case and the cause of death of the deceased was multiple sharp injuries. At the end of the case, the learned High Court judge rejected the defence of self defence and provocation raised by the appellant, convicted the F appellant under s 302 of the Penal Code ('the PC') and sentenced the appellant to death by hanging, hence, the present appeal. Initially, the appellant had filed appeals against both the conviction and sentence but subsequently the appellant withdrew the appeal against the conviction and only proceeded with the appeal against the sentence. The appellant prayed for the death penalty to G be changed to a term of imprisonment. In the mitigating submission, the appellant highlighted that since both the deceased and the appellant were injured in the incident, a lighter sentence should be granted to the appellant in this appeal. The appellant further requested that the imprisonment term to run from the date of the arrest. The prosecution on the other hand submitted that H the death sentence granted by the learned High Court judge should be affirmed.

Held:

I (1) Previously, the punishment for murder under s 302 of the PC was the death penalty only. Via s 34 of the Abolition of Mandatory Death Penalty Act 2023 ('Act 846'), s 302 of the PC was amended by inserting after the words, 'with death' the words 'or imprisonment for a term of not less than thirty years but not exceeding forty years and if not sentenced to death, shall also be punished with whipping of not less than twelve strokes'. This

amendment came into effect on 4 July 2023, as such, this amendment was applicable to the present appeal (see paras 33–34).

(2) For offences under s 302 of the PC, Act 846 had given the discretionary power to the court to determine the punishment that should be given to the accused, which was either the death penalty or a prison sentence of not less than 30 years which could be extended up to 40 years and whipping not less than 12 lashes. In this situation, the court opined that the court could still consider the applicable legal principles in deciding whether the death penalty should be imposed or otherwise. The introduction of Act 846 did not in any way prevent the court from referring to the basis of the existing sentencing principle (see paras 35–36).

(3) The court also referred to the official statement of the Dewan Rakyat (15th Parliament, Second Term First Meeting) on 3 April 2023, which stated that the Parliament's intention to amend the existing law by introducing Act 846 to abolish the death penalty was an initial step in transforming the justice system of crime in Malaysia. In addition, the basic principle behind every sentencing in Malaysia was the rehabilitation of prisoners so that they could return to society and become individuals who served the family, community, and country after completing their sentence. The court also took this into account (see para 37).

(4) After examining the plea of mitigation from the appellant and the submission by the prosecution for a deterrence sentence, the court found it appropriate for the appellant to be sentenced to imprisonment for a term of 35 years from the date of arrest and 12 strokes of whipping (see para 38).

[Bahasa Malaysia summary

Ini adalah kes menyayat hati sebuah hubungan yang bertukar menjadi buruk yang berakhir dengan pembunuhan si mati oleh perayu. Kedua-dua si mati dan perayu mengalami kecederaan dalam kes ini dan punca kematian si mati adalah beberapa kecederaan tajam. Pada akhir kes, hakim Mahkamah Tinggi Yang Arif menolak pembelaan pertahanan diri dan provokasi yang dibangkitkan oleh perayu, mensabitkan perayu di bawah s 302 Kanun Keseksaan ('KK') dan menjatuhkan hukuman gantung sampai mati kepada perayu, oleh itu, rayuan semasa. Pada mulanya, perayu telah memfailkan rayuan terhadap sabitan dan hukuman tersebut tetapi kemudiannya perayu menarik balik rayuan terhadap sabitan dan hanya meneruskan rayuan terhadap hukuman. Perayu memohon agar hukuman mati ditukar kepada pemenjaraan. Dalam hujahan mitigasi, perayu menekankan bahawa memandangkan kedua-dua si mati dan perayu telah cedera dalam kejadian tersebut, hukuman yang lebih ringan harus diberikan kepada perayu dalam rayuan ini. Perayu seterusnya meminta supaya

tempoh pemenjaraan berjalan dari tarikh tangkapan. Pihak pendakwaan sebaliknya berhujah bahawa hukuman mati yang diberikan oleh hakim Mahkamah Tinggi Yang Arif perlu disahkan.

Diputuskan:

(1) Sebelum ini, hukuman bagi pembunuhan di bawah s 302 KK adalah hukuman mati sahaja. Melalui s 34 Akta Pemansuhan Hukuman Mati Mandatori 2023 ('Akta 846'), s 302 KK telah dipinda dengan memasukkan selepas perkataan, 'with death' perkataan 'or imprisonment for a term of not less than thirty years but not exceeding forty years and if not sentenced to death, shall also be punished with whipping of not less than twelve strokes'. Pindaan ini berkuat kuasa pada 4 Julai 2023, oleh itu, pindaan ini terpakai pada rayuan semasa (lihat perenggan 33–34).

(2) Bagi kesalahan di bawah s 302 KK, Akta 846 telah memberikan kuasa budi bicara kepada mahkamah untuk menentukan hukuman yang sepatutnya diberikan kepada tertuduh, iaitu sama ada hukuman mati atau hukuman penjara tidak kurang daripada 30 tahun yang boleh dilanjutkan sehingga 40 tahun dan sebatan tidak kurang daripada 12 sebatan. Dalam situasi ini, mahkamah berpendapat mahkamah masih boleh mempertimbangkan prinsip undang-undang yang terpakai dalam memutuskan sama ada hukuman mati perlu dikenakan atau sebaliknya. Pengenalan Akta 846 tidak sama sekali menghalang mahkamah daripada merujuk kepada asas prinsip hukuman sedia ada (lihat perenggan 35–36).

(3) Mahkamah juga merujuk kepada Penyata Rasmi Dewan Rakyat (Parlimen Ke-15, Mesyuarat Pertama Penggal Kedua) pada 3 April 2023, yang menyatakan hasrat Parlimen untuk meminda undang-undang sedia ada dengan memperkenalkan Akta 846 untuk memansuhkan hukuman mati adalah satu langkah awal dalam mengubah sistem keadilan jenayah di Malaysia. Di samping itu, prinsip asas di sebalik setiap hukuman di Malaysia ialah pemulihan banduan supaya mereka boleh kembali ke dalam masyarakat dan menjadi individu yang berkhidmat kepada keluarga, masyarakat dan negara selepas tamat menjalani hukuman. Mahkamah juga mengambil kira perkara ini (lihat perenggan 37).

(4) Selepas meneliti rayuan mitigasi daripada perayu dan penghujahan oleh pihak pendakwaan untuk hukuman pencegahan, mahkamah mendapati wajar bagi perayu dijatuhi hukuman penjara selama tempoh 35 tahun dari tarikh tangkap dan 12 sebatan (lihat perenggan 38).]

Legislation referred to

Abolition of Mandatory Death Penalty Act 2023 s 34
Penal Code s 302

Appeal from: *Public Prosecutor v Md Masud Rana* [2019] MLJU 1533 (High Court, Johor Bahru)

Vijaya Sandran a/l Tangavellu (with Kirthana Darshayinie) (Vijaya Sandran & Assoc) for the appellant.
Mohd Amril bin Johari (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Hashim Hamzah JCA:

INTRODUCTION

[1] This is an appeal by the appellant against the conviction by the learned High Court judge ('LHCJ') who found the appellant guilty of murder and sentence him to death by hanging.

[2] On the hearing date of this appeal, the appellant's counsel informed us that the appellant wanted to withdraw his appeal against the conviction and only proceed with appeal against the sentence. The deputy public prosecutor ('DPP') has no objection.

[3] The appellant in the present appeal was charged under s 302 of the Penal Code. The charge against the appellant reads:

> Bahawa kamu pada 23 Disember 2016 di antara jam 4.00 pagi hingga 6.40 pagi di alamat No 9, Jalan Beladau 26, Taman Puteri Wangsa, Ulu Tiram di dalam Daerah Johor Bahru di dalam Negeri Johor Darul Takzim, telah melakukan kesalahan membunuh dengan menyebabkan kematian ke atas Conda Liezyl Ponce (No Passport: EB 5547222) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[4] In the High Court, the appellant did not plead guilty to the charge and claimed for trial.

THE PROSECUTION'S CASE

[5] The prosecution called 14 witnesses, and briefly, the evidence led by the prosecution as narrated by the LHCJ in her grounds of judgment is as follows.

[6] On 23 December 2016 at around 7am, Encik Syed Khairrul Annuar bin Veran ('SP11') received a telephone call from the appellant informing SP11 in a crying tone that he was feeling pressured, wanted to kill himself and that his time was up. SP11 subsequently tried to contact the appellant several times but there was no answer.

[7] Later, SP11 went to the appellant's rented room at No 9, Jalan Beladau 26, Taman Puteri Wangsa, Ulu Tiram. Upon his arrival, the room was locked from the inside, however, SP11 managed to open the door from the outside using a kitchen knife. SP11 then saw the appellant with a woman ('the deceased') lying face down on the mattress with a lot of blood and the room in a mess. SP11 then contacted the ambulance and the police to come to the scene.

[8] Between 7.30am and 7.35am, Encik Abdul Khalid bin Abdul Razak ('SP12') arrived at the scene after SP11 contacted him. SP12 saw the deceased on the mattress in the room. There was no one else in the room other than the appellant and the deceased. SP12 heard the appellant groaning softly in pain.

[9] SP11 contacted the nearest police station to lodge a report. Lance Corporal Mohamad Nur Ashraf bin Mohd Dali ('SP5') received the report and lodged Pelangi Indah Report/008935/16.

[10] ASP Akup ak Janggu ('SP7'), the Chief Police at the Taman Pelangi Police Station went to the scene at approximately 8.10am together with Corporal Mohd Laily bin Ramli, Lance Corporal Khairul Adha, Support Lance Corporal Mohd Rizal and Lance Corporal Mohamad. Upon their arrival at the shop house, SP7 met SP11 and SP12 before SP7 was taken by SP11 to the room where the incident happened.

[11] SP7 then saw the deceased in the room and SP7 contacted the police station to inform the investigating officer ('IO') and the forensic team to come to the scene. At about 9am, the IO ('SP14') and the forensic team led by the ASP Tha Na Sak ('SP4') arrived to conduct further investigations on the deceased and the room.

[12] The appellant who was assisted by SP7 and two station personnel went down to the ground floor and was surrendered to the ambulance as the appellant was injured in the stomach.

[13] The shop house where the incident occurred belongs to Puan Eng Yet Ken ('SP8') since 1992 which was rented to Encik Aramugam a/l Mutuveli ('SP9') since 2003. There are two floors to the premises. SP9 is the tenant for the shop house who initially rented the shop house for his business of supplying labour to the factories. SP9 confirmed that the upper floor of the shop house was used for his workers to sleep and that there were six rooms. However, when the factories closed down, SP9 utilised the ground floor for a saloon business and the upper floor was rented out, including to the appellant. The appellant was tasked to collect rentals from all tenants and give the rentals to SP9. Room three, five and six were vacant with no tenants.

[14] SP9 confirmed that at 2am when he was on the ground floor of the shop house he heard loud noises from the upper floor of the shop house. Later, at around 6.45am to 7.45am, SP9 went up to the first floor and saw two men, SP11 and SP12, in front of the appellant's room. SP9 saw the appellant and a woman in the said room but SP9 did not go into the room. Instead SP9 went downstairs to the last shop house and sat on the stone by the road side.

[15] The forensic team led by SP4 carried out and inspection on the deceased and found four stab wounds on the stomach of the deceased and laceration on the deceased's left foot. A knife stained with blood was found near the mattress. A machete (*parang*) was also found approximately two feet from the mattress. The deceased was Conda Liezyl Ponce (Passport No: EB 5547222) a Filipina national.

[16] The pathologist, Dr Rohayu bt Syahar Adnan ('SP13') conducted a post mortem on the deceased on 23 December 2016 at 3.45pm. Based on the decomposition of the corpse, SP13 confirmed that the approximate time of death of the deceased is less than 24 hours, that is between 3.45pm on 22 December 2016 and the time of the post mortem.

[17] In summary, SP13's post mortem report (P20) concluded the following:

(a) the deceased sustained multiple blunt injuries on the head, torso and limbs. There were also superficial sharp injuries which were not fatal but consistent with defense wounds;

(b) chop wound sustained by deceased were due to sharp object with single edge blade;

(c) chop wounds to the head had severed the skull and corresponding blood vessels;

(d) stab wound to the abdomen had severed the major abdominal artery and vein which were inferior mesentery artery, inferior vena cava and right renal vein; and

(e) combination of both chop and stab wounds were incompatible with life.

[18] Based on the findings of P20, SP13 found the cause of death of the deceased to be from multiple sharp injuries.

[19] SP14's investigation of the rented room occupied by the appellant and the deceased shared that there were no signs of intrusion by another person or that the appellant and the deceased were attacked by another person that resulted in death. The appellant was injured on the left side of his stomach

which resulted in part of his bowels protruding. SP13 confirmed that the injury sustained by the appellant was not serious.

[20] SP14's investigation concluded that the appellant is the only suspect in this murder. No one else other than the appellant was involved in the incident.

Findings of the LHCJ at the end of prosecution's case

[21] At the close of the prosecution's case, the LCHJ held that the prosecution had successfully proven a prima facie case against the appellant for the charge of murder under s 302 of the Penal Code. Thus, the appellant was consequently ordered to enter his defence.

THE DEFENCE'S CASE

[22] The appellant chose to take stand and give evidence under oath. The defence put by the appellant was both the appellant and the deceased (the appellant's girlfriend) had met on 22 December 2016 and drank liquor together.

[23] Whilst drinking, there had been a few heated arguments between them as the deceased demanded to check appellant's mobile phone and for the appellant to divorce his wife.

[24] The deceased then went to the toilet and upon returning, the appellant saw that the deceased had a knife in her hand and proceeded to stab appellant in the stomach. The appellant managed to avoid being stabbed again, and a physical fight ensued but due to the extreme pain, lost his consciousness. Upon regaining consciousness, the appellant called SP11.

[25] The second defence witness was Dr Abdul Hazim bin A Baba ('SD2') who was the doctor that prepared the medical report (IDD22) for the appellant's injury at Hospital Sultan Ismail, Johor Bahru. Based on IDD22, it was stated that the initial examination of the appellant's injury was 'alleged stab wound injury' with protrusion bowel and perforation of bowel. As a result of the injury, an emergency surgery was conducted on the appellant as there were two punctures to the bowel approximately 1cm and 0.5cm respectively.

[26] SD2 was of the view that a person who had such an injury as the appellant could lead to death if the injury was not treated. SD2 also testified that the appellant was responsive and the appellant was mentally able to think clearly while sustaining the injury.

[27] During re-examination, SD2 further stated that there is a possibility that the appellant's movement was limited due to the pain he felt.

Findings of the LHCJ at the end of defence's case

[28] At the end of the defence's stage, the LHCJ rejected the defence of self defence and provocation raised by the appellant, hence, found that the appellant had failed to raise a reasonable doubt in the prosecution case for murder. As a result, the appellant was convicted of murder under s 302 of the Penal Code and sentenced to death by hanging.

THE PRESENT APPEAL

[29] As mentioned above, the appeal before us is only against the sentence. Therefore, we have asked the appellant's counsel and also the DPP to make a mitigation appeal related to the sentence.

[30] The appellant's counsel submitted before us that the appellant prayed for the death penalty to be changed to a term of imprisonment. It was highlighted in the appellant's mitigating submission that since both the deceased and the appellant was injured in the incident, a lighter sentence should be granted to the appellant in this appeal.

[31] The appellant also further request that the imprisonment term to run from the date of the arrest.

[32] On the other hand, the DPP submitted that the death sentence granted by the LHCJ should be affirmed. But the DPP also leaves to the discretion of this court if this court wishes to sentence the appellant to imprisonment.

OUR ANALYSIS AND FINDINGS

[33] Previously, the punishment for murder under s 302 of the Penal Code was the death penalty only. Through s 34 of the Abolition of Mandatory Death Penalty Act 2023 ('Act 846'), s 302 of the Penal Code was amended by inserting after the words, 'with death' the words 'or imprisonment for a term of not less than thirty years but not exceeding forty years and if not sentenced to death, shall also be punished with whipping of not less than twelve strokes'.

[34] This amendment comes into effect on 4 July 2023 through the PU Gazette (B) 229 dated 30 June 2023. Therefore, this amendment applies to the appeal before us.

[35] For offenses under s 302 of the Penal Code, Act 846 has given the

discretionary power to this court to determine the punishment that should be given to the accused, which is either the death penalty or a prison sentence of not less than 30 years which can be extended up to 40 years and whipping not less than 12 lashes.

[36] In this situation, we are of the opinion that we can still consider the applicable legal principles in deciding whether the death penalty should be imposed or otherwise. The introduction of Act 846 does not in any way prevent us from referring to the basis of the existing sentencing principle.

[37] We also refer to the official statement of the Dewan Rakyat (15th Parliament, Second Term First Meeting) on 3 April 2023, which stated that Parliament's intention to amend the existing law by introducing Act 846 to abolish the death penalty is an initial step in transforming the justice system crime in Malaysia. In addition, the basic principle behind every sentencing in Malaysia is the rehabilitation of prisoners so that they can return to society and become individuals who serve the family, community and country after completing their sentence. The court also needs to take this into account.

CONCLUSION

[38] In conclusion, after examining the plea of mitigation from the appellant and the submission by DPP for a deterrence sentence, we found it appropriate for the appellant in this appeal to be sentenced to imprisonment for a term of 35 years from the date of arrest and 12 strokes of whipping.

Order accordingly.

Reported by Dzulqarnain Ab Fatar